IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1944.

ALFONSO DIUGUID,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 27th, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, U. S. C. Title 28, Section 347.

STATEMENT OF THE CASE.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.

It is intended to urge all the errors assigned (fols. 81-83) including the following:

1. It was error for the District Court to admit into evidence the articles to wit, still, alcohol, mash, etc., which were seized by the federal agents who were guilty of misconduct in entering the apartment of the petitioner and seizing the evidence without a warrant of search and seizure or arrest.

2. It was error for the court to hold that the search of the petitioner's apartment by the federal agents without a warrant was not an illegal and unconstitutional invasion of the petitioner's rights.

3. The court erred in denying the petitioner's motion to dismiss the indictment at the close of the government's case on the ground that the only evidence submitted was that obtained by the federal agents by an illegal search and seizure.

4. It was error for the court to refuse to return or suppress the evidence, to wit, still, alcohol and mash, illegally seized by the federal agents.

ARGUMENT.

I.

IT WAS ERROR FOR THE DISTRICT COURT TO ADMIT INTO EVIDENCE THE ARTICLES TO WIT, STILL, ALCOHOL, MASH, ETC., WHICH WERE SEIZED BY THE THE FEDERAL AGENTS WHO WERE GUILTY OF MISCONDUCT IN ENTERING THE APARTMENT OF THE PETITIONER AND SEIZING THE EVIDENCE WITHOUT A WARRANT OF SEARCH AND SEIZURE OR ARREST.

A.

The Federal Agents Were Guilty of Misconduct.

It was conceded upon the trial that neither the police officers nor the federal agents had warrants of search and seizure or arrest. Nor was the seizure incidental to a lawful arrest, the arrest having taken place after the search and seizure had been effected.

At the very outset it may be stated that this is not a case wherein a local police officer makes an illegal search and seizure and subsequently turns over the fruits of the search to federal agents who prosecute the case.

The record in the case at bar is clear that the federal agents were guilty of misconduct in making the search and seizure. They were guilty of the crime of unlawful entry when they entered the apartment of the petitioner without a warrant of search and seizure or arrest and seized the evidence. They were guilty of violating Sections 405, 1846 and 1847 of the Penal law of the State of New York. Section 405 provides that a person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a crime, is guilty of a misdemeanor. Section 1846 prohibits a seizure without lawful authority and Section 1847 makes it a misdemeanor for an officer who in executing a search warrant willfully exceeds his authority, or exercises it with unnecessary severity.

A forceful condemnation of the government's use of evidence obtained by a criminal act may be found in the dissenting opinion of Mr. Justice Holmes in the case of *Olmstead* v. *United States*, 277 U. S. 438. At page 469 Mr. Justice Holmes stated in part as follows:

> "* * * But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act, * * * It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained. If it pays its officers for having gotten evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits, we have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

The government has sought to sustain the legality of the search and seizure upon the theory that the police officer initiated the search and thereafter notified the federal agents, who appeared upon the scene and "adopted" the case.

The government's contention, which was sustained by the court below, is based upon an erroneous theory, and a misinterpretation of the facts. In essence, the government's contention was, as set forth in the opinion of the court below, "when federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it." But in its holding, the court overlooked or ignored important facts.

The petitioner has hereinabove shown that the federal agents were guilty of misconduct and the record is clear that it was the federal agent who seized the evidence and not the

police officer. The police officer testified that the federal agent took over the still (fol. 42). The federal agent corroborated the police officer when he testified that he took over the still and arrested the petitioner (fols. 52, 53).

The unauthorized entry of the federal agents into the home of the petitioner, their search of the premises and seizure of the evidence constituted such misconduct and criminality on their part which must be held to have been a violation of the petitioner's constitutional rights.

There is no sanction in law for condoning the acts of the federal agents merely because they entered and searched the home of the petitioner upon a telephone call from the police officers, who themselves had forcibly and illegally entered the premises without a warrant. The fact that the police officers were forcibly in possession of the petitioner's home did not make it any less his home and did not make his home any less inviolate against search and seizure by the federal agents. The illegal acts of the police officers cannot lend legality to the unlawful acts of the federal agents.

Neither the police officer nor the federal agents had any regard whatever for the constitutional rights of the petitioner. The entire transaction from the time the police officers received the information until the federal agents appeared on the scene took several hours. There was sufficient time to obtain a search warrant.

The case of *Taylor* v. *United States*, 286 U. S. 1, is in point. At page 6, the court stated in part as follows:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

> "We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. * * * "

The United States Supreme Court has time and again condemned the use of evidence illegally obtained by federal agents who participate in a wrongful search and seizure. In the case of *Byars* v. *U. S.*, 273 U. S. 28, the United States Supreme Court stated, at page 33:

> "We do not question the right of the federal government to avail itself of evidence improperly seized by State officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action."

In the case of *Agnello* v. *U. S.*, 269 U. S. 20, the Supreme Court of the United States condemned searches without a warrant even though there was probable cause. In that case, at page 33, the court stated:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or State, for the search of a private dwelling without a warrant. Absence of any judicial approval is persuasive argument that it is unlawful. See Enetick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

See also:

Miller v. *United States*, 50 Fed. (2nd) 505.

B.

The Police Officers and Federal Agents Acted in Concert.

The court below erred in approving the finding of the District Court that the federal agents did not act in concert with the police officers in making the raid.

The petitioner urged in the court below, that an analysis of the evidence indicated that the federal agents and the police officers were either acting in concert or had some understanding prior to the search and seizure. It was also urged in the court below that though the police officer and the federal agent testified that they were not acting in concert, their mere "say so" was not conclusive. The inherent probabilities and inferences which this court may draw from the entire case, belie their sworn testimony.

Defense counsel in cross-examining the police officer elicited that he had been on other raids with the federal agent, but the court refused to permit counsel to pursue that line of questioning further (fols. 41-42). Such refusal constituted serious and reversible error. Defense counsel sought to show a course of dealing from which the court could draw the inference that there was a mutual understanding. The police officer was experienced in raiding stills and had been on quite a few cases (fol. 31).

The court below overlooked another important portion of the testimony. The police officer testified that after he forcibly entered the apartment of the petitioner, he telephoned the home of agent Sparago, with whom he had been on previous cases (fol. 39). What other inference is to be drawn from this testimony than that some prior arrangement was made by the federal agent Sparago with the police officer. The fact that the police officer had the federal agent's home telephone number indicates that the police officer was to call the federal agent any time during the day or night.

C.

The Investigation by the City Police Officer Was Made Solely for the Purpose of Aiding the Federal Government in the Enforcement of Its Laws.

The police officer testified that he received a tip that a still was in operation and went out to investigate (fol. 30). The police officer was not investigating some state or local crime and incidental thereto had uncovered the commission of a federal offense. The police officer specifically investigated the information concerning the operation of an illegal still (fol. 30), which is a federal offense. He was acting solely for the United States to the same extent as if he were a federal agent.

In *Gambino* v. *United States,* 275 U. S. 310, the arrest and seizure were made by state troopers believing they were required to enforce the prohibition act. The search and seizure were made solely for the purpose of aiding the United States in the enforcement of its laws. No State law was involved. This court held that while it was true that the state troopers did not act under the direction of the federal agents the rights of a defendant may be evaded as effectively by such cooperation as by state officers acting under the personal direction of the federal officers. The evidence secured by the state troopers was the very foundation of the prosecution and supplied the only evidence of guilt. This court, therefore, held that the evidence so obtained violated the constitutional rights of the defendant.

In *Miller* v. *United States, supra,* the Circuit Court of Appeals held in the course of its opinion that a search and seizure were illegal when made solely on behalf of the United States.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN APPARENT CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL FOR THE THIRD, FOURTH AND TENTH CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

(a) The decision of the court below apparently conflicts with the decision in the case of *Miller* v. *U. S.*, supra, decided by the Circuit Court of Appeals for the Third Circuit. It is implicit in that decision that a search and seizure would be held unlawful when made by federal officers who enter the apartment of a defendant without a warrant of search and seizure or arrest, which apartment had been illegally and forcibly entered by police officers who likewise had no warrant of search and seizure or arrest.

(b) The decision of the court below is in apparent conflict with the decision in the case of *Sutherland* v. *U. S.*, 92 Fed. 2nd 305; Circuit Court of Appeals, Fourth Circuit.

In that case, the court condemned the use of evidence which had been obtained illegally by State officers and which had been turned over to the Federal Government, which thereafter adopted the case and prosecuted it.

(c) The decision of the court below is in apparent conflict with the decision in the case of *Gilbert* v. *U. S.*, 144 Fed 2nd 568, Circuit Court of Appeals, Tenth Circuit.

In that case, the court condemned the use of evidence illegally obtained by one other than a federal agent which evidence the government sought to use after it had adopted the case.

(d) The decision of the court below is in apparent conflict with the decisions of this court in the following cases: *Gambino* v. *U. S.*, *supra*; *Byars* v. *U. S.*, *supra*; *Agnello* v. *U. S.*, *supra*; *Gouled* v. *U. S.*, 255 U. S. 298.

The cases of *Gambino, Byars* and *Agnello* have been discussed hereinabove in this brief.

In the *Gouled* case a federal agent acquainted with the defendant obtained admission to his home upon the pretense of making a friendly call. In the temporary absence of the defendant, the agent took some of the defendant's papers which the government subsequently sought to admit into evidence. This court held, in effect, that though the agent had obtained admission in a lawful manner, the search and seizure were illegal, having been made without a warrant. This court on page 305 stated as follows:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure as it certainly would be, it is impossible to successfully contend that a like search and seizure would be an unreasonable one if only admission were obtained by stealth instead of by force or coercion.
>
> "The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

As hereinabove stated, the entrance by the federal agents into the home of the petitioner was illegal in the first instance. If, as the court stated in the *Gouled* case, evidence cannot be used which had been obtained after a legal entrance, can it be the law that evidence obtained after an illegal entrance can be used?

Former Attorney General George W. Wickersham, in his famous report on law enforcement, stated: "Lawless law enforcement is destructive of good government and democracy." The government's feeble attempt to justify the lawless conduct of the city and federal officers should find no sanction by this court.

CONCLUSION.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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